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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91192781
Party	Defendant Biogen Idec MA Inc.
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Date	10/15/2010
Attachments	B1152.50001US00.Motion for Summary Judgment.PDF ( 3 pages )(53077 bytes ) B1152.50001US00. Memo in support of Motion.PDF ( 14 pages )(610235 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

Opposer: Bayer HealthCare, LLC  
Applicant: Biogen IDEC MA Inc.  
Serial No.: 77/701134  
Filing Date: March 27, 2009  
Mark: LIXALEV  
Published: July 28, 2009

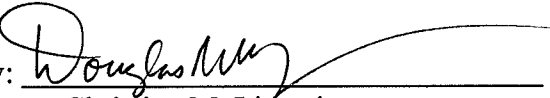
Bayer HealthCare, LLC	)	Opposition No. 91192781
	)	
Opposer,	)	Application Serial No. 77/701134
	)	Mark: LIXALEV
	)	
v.	)	
	)	
Biogen Idec MA Inc.,	)	
	)	
Applicant	)	
	)	

**APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to 37 C.F.R. ss 2.127 and 2.116(a) and Federal Rules of Civil Procedure 12(b)(6) and 56(c), Applicant, Biogen Idec MA Inc. (the "Applicant" or "Biogen"), through its undersigned counsel, hereby moves for summary judgment on the Notice of Opposition filed by the Opposer, Bayer HealthCare, LLC (the "Opposer" or "Bayer") because, as a matter of law and fact, there is no likelihood of confusion between the Applicant's mark and the Opposer's mark.

Respectfully submitted,

Biogen IDEC MA Inc.

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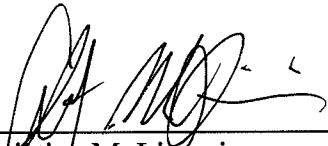
Attorneys for Applicant

Date: October 15, 2010  
Docket No.: B1152.50001US00

**CERTIFICATE OF SERVICE**

I hereby certify that on October 15, 2010, I served a copy of Applicant's Motion for Summary Judgment upon counsel for Opposer, by first-class mail, postage-prepaid, addressed to:

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Attorney Docket: B1152.50001US00

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Biogen Idec MA Inc.,	)	
	)	
Applicant	)	

**APPLICANT'S MEMORANDUM IN SUPPORT OF ITS**

**MOTION FOR SUMMARY JUDGMENT**

Pursuant to 37 C.F.R. §§ 2.127 and 2.116(a) and Federal Rules of Civil Procedure 12(b)(6), Applicant, Biogen Idec MA Inc. ("Applicant" or "Biogen"), through its undersigned counsel, hereby moves for summary judgment of the Notice of Opposition filed by the Opposer, Bayer HealthCare LLC ("Opposer" or "Bayer") because, as a matter of law and fact, there is no likelihood of confusion between the Applicant's mark and the Opposer's mark.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. THE PARTIES**

According to the Opposition, Bayer is a Delaware limited liability company having a principal place of business at 100 Bayer Road, Pittsburgh, Pennsylvania 15205. Bayer claims to have used the mark ALEVE (U.S. Registration No. 1,536,042) in connection with “anti-inflammatory, analgesic, and antipyretic pharmaceutical preparations” since at least as early as April 25, 1988. Bayer also claims ownership to a registration for the mark ALEVE (U.S. Registration No. 3,287,780) for “pharmaceutical antitussive-cold preparations; preparations for treating colds,” which registered on September 4, 2007.

Biogen is a Massachusetts corporation with an address at 14 Cambridge Center, Cambridge, Massachusetts 02142. On March 27, 2009, Biogen filed an intent-to-use application for registration of the mark LIXALEV (U.S. Serial No. 77/701,134) for “pharmaceutical preparations for the treatment of cardiovascular disorders.” No applications or registrations were cited by the Examining Attorney during prosecution of the LIXALEV application, and the LIXALEV mark was published in the Official Gazette on July 28, 2009.

### **II. THE NOTICE OF OPPOSITION**

Opposer filed a Notice of Opposition to the LIXALEV application on November 23, 2009 on the grounds of likelihood of confusion based on its ALEVE rights, claiming similarity in “appearance, sound, and commercial impression” and on the grounds that the goods are related.

## ARGUMENT

### **III. SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Greyhound Corp. v. Both Worlds, Inc.*, 6 USPQ2d 1635, 1638 (TTAB 1988). The aim of summary judgment is to resolve disputes where no genuine issue of material fact remains, and where no evidence beyond that which is already available in support of the summary judgment motion could reasonably be expected to change the result. *United Rum Merchs., Ltd. v. Distiller's Corp.*, 9 USPQ2d 1481, 1482 (TTAB 1988).

No genuine issue for trial exists where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1987). A dispute is genuine only if, on the entirety of the record, a reasonable trier of fact could resolve a factual matter in favor of the non-moving party. *Sweats Fashion, Inc. v. Pannill Knitting Co.*, 4 USPQ2d 1793, 1795 (Fed. Cir. 1987). Disputes over facts which will not affect the outcome under the governing law are immaterial and do not preclude the entry of summary judgment.

When the moving party's motion is supported by evidence sufficient to indicate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment, the burden shifts to the non-moving party to demonstrate the existence of specific genuinely disputed facts that must be resolved at trial. *Hurley Int'l LLC v. Volta*, 82 USPQ2d 1339, 1343 (TTAB 2007).

Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment in cases such as this, where the material facts are not in dispute, and clearly establishes that a determination of no likelihood of confusion is appropriate as a matter of law. As set forth in the Argument section below, this is just the case, and the Notice of Opposition should be dismissed under Rule 56.

**IV. THE RELEVANT UNDISPUTED DUPONT FACTORS DEMONSTRATE NO LIKELIHOOD OF CONFUSION**

A determination of the existence of a likelihood of confusion is based on an analysis of all of the probative factors relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973); *see also Shen Mfg. Co. v. The Ritz Hotel Ltd.*, 393 F.3d 1238, 1241 (Fed. Cir. 2004). Those factors are:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, i.e. “impulse” vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of actual confusion.
- (8) The length and time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).
- (10) The market interface between the applicant and the owner of a prior mark:
  - a. A mere “consent” to register or use.
  - b. Agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.
  - c. Assignment of mark, application, registration, and good will of the related business.
  - d. Laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.

- (12) The extent of potential confusion, i.e., whether de minimus or substantial.
- (13) Any other established fact probative of the effect of use.

*du Pont*, 476 F.2d at 1361. In determining whether a likelihood of confusion exists, however, the Trademark Trial and Appeal Board need not consider every *du Pont* factor. *Shen Mfg.*, 393 F.3d at 1241; *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998). Rather, the TTAB is only required to consider relevant factors. *Shen Mfg.*, 393 F.3d at 1241.

The various *du Pont* factors “may play more or less weighty roles in any particular determination.” *In re Shell Oil*, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993). Further, there is no order of merit to these factors, and the dominance of the factors may vary from case to case. *du Pont*, 476 F.2d at 1361. Still, the first *du Pont* factor carries a special significance. Understandably, if the marks are dissimilar, this factor is determinative of the issue of confusion. *Kellogg Co. v. Pack’em Enters., Inc.*, 14 USPQ2d 1545, 1550-51 (TTAB 1990), *aff’d*, 951 F.2d 330 (Fed. Cir. 1991) (affirmed TTAB decision finding no likelihood of confusion based on the first *du Pont* factor alone). In *Kellogg*, Pack’em applied to register the mark FROOTEE ICE with the design of an elephant for use on packages of flavored liquid frozen into ice bars. Kellogg opposed the application, alleging likelihood of confusion with its registered mark FRUIT LOOPS for breakfast cereals and other goods. *Kellogg Co.*, 14 USPQ2d at 1548. The Board granted Pack’em’s motion for summary judgment, finding that the differences between the marks were so substantial as to be dispositive of the likelihood of confusion issue. *Id.* at 1550.

In this case, too, the first *du Pont* factor alone is dispositive as noted below. In the instant case, as in *Kellogg*, the marks at issue are completely dissimilar in their appearance, meaning,

sound, and overall commercial impressions. The substantial difference between ALEVE and LIXALEV is sufficient to support summary judgment.

The other elements of the *du Pont* analysis also support Applicant's motion for summary judgment but will only be briefly discussed. Applicant's focus on the dissimilarity in appearance, sound, and commercial impression should not be taken as an admission on the remaining *du Pont* factors.

**A. The marks are completely dissimilar in appearance, sound, and connotation**

**1. Appearance**

Bayer's Opposition fails at the most basic aspect of the likelihood of confusion analysis since the marks at issue are patently dissimilar in appearance.

As required by *du Pont*, each of the two marks must be considered in their entirety. Bayer's position has to be the common, four consecutive letters A-L-E-V creates an overlap of appearance between ALEVE and LIXALEV. For Bayer, A-L-E-V are the first four letters. In LIXALEV, however, these four letters appear at the end of the mark, following a visually significant LIX element. For Biogen, L-I-X are the first three letters of the mark. The LIXALEV mark critically begins with the noticeable "LIX" and has no ending "E," but appears truncated with an unusual V ending. The prefix term "LIX" is the visually dominant portion of the mark, which is commonly the beginning of a mark.

In addition, the marks must be considered as a whole, and the "E" at the end of Bayer's mark is visually distinct compared to the "V" at the end of Biogen's mark. Such dissimilarity in the appearance of the marks prevents any likelihood of confusion. *Shen Mfg.*, 393 F.3d at 1243; *Champagne Louis*, 148 F.3d at 1375 (affirming TTAB finding of no likelihood of confusion between "CRISTAL" and "CRYSTAL CREEK" wines).

Case law supports that consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374 (TTAB 2006). Here, the first part of Applicant’s multiple-syllable mark is the LIX portion of the mark. Conversely, the first and dominant portion of the Opposer’s mark is AL, which bears no resemblance to LIX. Even though the marks share common letters, based on the different placement of these letters within the marks, there is no similarity in the appearance between the two marks.

## **2. Sound**

Just as the LIXALEV mark and ALEVE are visually distinct from one another, the marks are also phonetically dissimilar. *Jet Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 423 (6<sup>th</sup> Cir. 1999) (finding the marks JET and AEROB-A-JET visually and verbally distinct).

The ALEVE mark has two syllables, whereas the LIXALEV mark is three syllables. Given the different arrangement of the letters in the marks, the Opposer’s mark and the Applicant’s mark are significantly different in pronunciation. The marks have a sound and cadence distinctly different from one another. The LIX portion of the Applicant’s mark amplifies the difference in sound between the marks.

Biogen does not dispute that Bayer’s mark is pronounced “ah-leeve.” Bayer, however, seeks to have the Board pronounce Biogen’s mark as “licks-ah-leeve.” This, however, is contrary to any known and all reasonable readings and pronunciations of Biogen’s mark. There

are no known English words ending with a “V” which would impart a long sound on a preceding vowel.

LIXALEV must be pronounced with a short “e,” like the nickname Bev for Beverly.

There are no known words ending with LEV that are pronounced with the long “e” sound. With no words to “teach” the consumer to pronounce LIXALEV as suggested by Bayer, there is no basis for similar pronunciations. Although the two marks may share the four letters “A-L-E-V,” the impact of the lack of a letter after the “V” in LIXALEV is significant. Regardless of the overlap of any letters between the two marks, there is no similarity in the pronunciations of the two marks.

### **3. Commercial Impression**

Even though the marks share four common letters, LIXALEV and ALEVE create different impressions. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

With respect to Bayer’s mark, the word “alleviate” is defined as follows: “relieve; lessen; to make (as suffering) more bearable.” *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/netdict/alleviate> (last visited September 29, 2010). Bayer’s goods are for cold and anti-inflammatory preparations. The ALEVE mark is intended to evoke the word “alleviate,” as consumers will associate ALEVE with relieving—or alleviating—pain or cold symptoms.

On the other hand, the LIXALEV mark is a fanciful mark that does not convey any clear meaning, as a whole or for each of the syllables separately. Clearly, “[t]he difference in sound, appearance, and commercial impression of the two marks are obvious and one is in no way suggestive of the other.” *Long John Distilleries, LTD v. Sazerac Co.*, 426 F.2d 1406, 1407 (CCPA 1970). In view of the differences between the marks in sound and appearance, as well as their differences in meaning and use, the marks as a whole convey distinctly different commercial impressions.

**4. The TTAB has found marks far more alike than those at issue here to be dissimilar**

The TTAB and the courts have frequently held that marks more alike than Bayer’s and Biogen’s to be not confusingly similar as a matter of law, regardless of the goods.

For example, in *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386 (Fed. Cir. 1989), the Court affirmed the Board’s dismissal on summary judgment of an opposition by the owner of PECAN SANDIES to an application for registration of PECAN SHORTEES, even though both of the marks were used on cookies. Setting aside the descriptive word “PECAN,” the Court acknowledged that, “both marks contain words that begin with an ‘s’ sound and terminate in an ‘ees’ sound.” *Id.* at 1389. Nevertheless, the Court agreed with the Board that SANDIES and SHORTEES were dissimilar in appearance, pronunciation, and meaning, and upheld the Board’s dismissal. *Id.* at 1390. Of course, in this case ALEVE and LIXALEV are even more distinct than the marks in *Keebler Co.* since the respective marks neither begin nor end with the same letters or the same sound.

In *Polaroid Corp. v. Oculens, Ltd.*, 196 USPQ 836 (TTAB 1977), the Board did not find confusing similarity between the registered mark POLAROID and the applicant’s mark

FILTEROID, even though both marks were used for sunglasses, and even though the mark POLAROID was famous. *Id.* at 839-40. The Board noted that the only similarity between marks lay in the common suffix “OID,” and that the remaining portions of the marks, namely “FILTER-” and “POLAR-,” did not look or sound alike or have the same connotation. *Id.* at 839.

More recently, in *Missiontrek Ltd. v. Onfolio, Inc.*, 80 USPQ2d 1381 (TTAB 2005), Missiontrek claimed that ONFOLIO was confusingly similar to its previously-registered software mark CARTAGIO. Onfolio moved for summary judgment claiming that the marks were so different that no facts developed in discovery or at trial could lead to a finding of confusing similarity. *Id.* at 1382. The Board decided the issue without a factual record, agreeing that “the dissimilarity of the marks in their entireties substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion.” *Id.* at 1383. The Board accepted Onfolio’s arguments that the only common element of the two marks was the suffix “IO,” that this is an ordinary English suffix found in numerous registered software marks, and that CARTAGIO and ONFOLIO were otherwise entirely different in appearance, sound, and meaning. *Id.* The Board nevertheless found that the overlap in the suffixes between the applicant’s mark and the opposer’s mark was not enough to establish a likelihood of confusion. In light of the identical suffixes, the marks were far more similar in *Missiontrek* than in the case at hand.

**B. The respective goods are entirely different and consequently confusion is unlikely**

As noted earlier, Biogen will briefly discuss a few of the remaining factors. Biogen concedes that the goods for both parties are pharmaceuticals, but submits that this is a broad

category and differences in goods can be enough to preclude confusion. *Astra Pharm. Prods. v. Beckman Instrs., Inc.*, 220 USPQ 786, 792 (1<sup>st</sup> Cir. 1983). Biogen's goods are "pharmaceutical preparations for the treatment of cardiovascular disorders," which are inherently only available by prescription.<sup>1</sup> Bayer's registrations are for "anti-inflammatory, analgesic, and antipyretic pharmaceutical preparations" and "pharmaceutical antitussive-cold preparations; preparations for treating colds." Biogen's goods and Bayer's goods are specifically directed to different indications: Bayer's mark is principally used with pain medication while Biogen's product is for the treatment of cardiovascular disorders. Quite simply, headaches and the common cold are treated very differently from heart disease. Such medical conditions are not the same illness, thereby mitigating any likelihood of confusion.

Courts have held that while the goods of the parties "were in the same broad and general area of health care products, their qualities and functions were so dissimilar and the channels of trade so diverse such as to prevent a likelihood of confusion as to source." *Id.* Consumers for Bayer and Biogen's products are purchasing the goods for substantially different reasons. Other than the fact that the products are broadly categorized as pharmaceuticals, they are not related in any other way, thereby mitigating a likelihood of confusion.

**C. The sophistication of the purchasers further demonstrates that confusion is not likely**

The Board and courts have held that consumers take great care in the purchase of health-related goods. *Id.* at 793. Biogen's applied-for-mark is for use with the treatment of

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<sup>1</sup> In an effort to clarify that these goods are only available by prescription, Biogen sought consent from Bayer to amend the application to "prescription pharmaceutical preparations for the treatment of cardiovascular disorders." Bayer has not consented to Biogen's offer to narrow the identification of goods. Accordingly, Biogen filed a Motion to Amend Application Without Consent with the Board on October 7, 2010. While the Board has found Biogen's proposed amendment "limiting in nature," the Board has deferred judgment on the proposed amendment until final judgment or until the case is decided upon summary judgment.

cardiovascular disorders. Inherent in this identification is the sophistication of the consumers of the LIXALEV product. These consumers—medical professionals—exercise a high degree of care and deliberation when choosing such products. Health professionals are sophisticated, having necessarily been educated about the benefits, side effects, and dosages of each drug, and being involved in the dispensing of prescription drugs on a daily basis. Thus, they are likely to exercise more than the normal degree of care in determining whether to prescribe certain drugs. *Pennwalt Corp. v. Center Labs., Inc.*, 187 USPQ 599, 601 (CCPA 1975) (“physicians may, as a group, be considered relatively careful or sophisticated purchasers”).

The more thought and consideration consumers put into their purchasing decisions, the less likely are those consumers to be confused among trademarks. *Magnaflux Corp. v. Sonoflux Corp.*, 109 USPQ 313, 315 (CCPA 1956). Medical professionals exercise great care in choosing between products because their choice directly affects the level of care they deliver to patients. Considering the great care and deliberation that these consumers of Biogen’s product will take, they will readily recognize the differences between LIXALEV and ALEVE and are not likely to be confused.

Although ALEVE is available directly to consumers over-the-counter, Bayer’s consumers also exercise a higher degree of care and consideration in their purchasing decision. It has been established that, “a reasonably prudent purchaser would be somewhat more careful when purchasing over-the-counter medications than when purchasing other houseware or grocery items. Most consumers are aware that medications can be dangerous if taken incorrectly and would therefore be reasonably careful when purchasing them.” *Smithkline Beckman Corp. v. Procter & Gamble Co.*, 223 USPQ 1230, 1241-2 (N.D.N.Y. 1984), *aff’d*, 755 F.2d 914 (2<sup>nd</sup> Cir. 1985). Therefore, even though Bayer’s product is available over-the-counter, because ordinary

consumers exercise a higher degree of care when purchasing medications, they are not likely to be confused between LIXALEV and ALEVE.

#### IV. CONCLUSION

Based upon the dissimilarities of the marks alone, Bayer cannot demonstrate a likelihood of confusion between ALEVE and LIXALEV. Further, in view of the inconsequential overlap of letters, differences in goods and trade channels, and the sophistication of the purchasers for the underlying products, Bayer cannot establish a likelihood of confusion. Accordingly, the Notice of Opposition should be dismissed.

For the foregoing reasons, Biogen respectfully requests summary judgment dismissing this Notice of Opposition.

Respectfully submitted,

Biogen IDEC MA Inc.

By: 

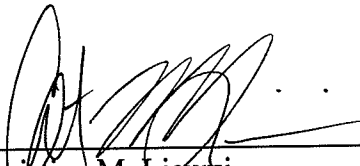
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Date: October 15, 2010  
Docket No.: B1152.50001US00

**CERTIFICATE OF SERVICE**

I hereby certify that on October 15, 2010, I served a copy of Applicant's Memorandum in support of its Motion for Summary Judgment upon counsel for Opposer, by first-class mail, postage-prepaid, addressed to:

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